

STATE OF MICHIGAN
COURT OF APPEALS

SHELDON KORN, GALE KORN, ASHLEY
KORN, SHAUNA KORN, KORN FAMILY LTD.
PARTNERSHIPS and CRANBROOK PARK
LLC,

Plaintiffs,

v

UNGER, GARRATT & BACHAND, PLLC, d/b/a
UG&B, PLLC,

Defendant-Appellee,

and

AMERICAN ARBITRATION ASSOCIATION,

Defendant,

and

RILEY RICHARD,

Appellant.

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Appellant Riley Richard appeals as of right from an order awarding defendant Unger, Garratt & Bachand, P.L.L.C. (hereinafter “defendant”), \$35,380.67 in attorney fees and costs as sanctions against plaintiffs and Richard for filing a frivolous action.¹ Because we conclude that

¹ Although the order provides that plaintiffs and Richard are jointly and severally liable for the sanctions, only Richard is a party to this appeal.

the issue of liability for defendant's attorney fees and costs associated with this action was resolved in a prior arbitration proceeding, we reverse and vacate the award of sanctions.

Plaintiffs retained defendant law firm to represent them in two separate matters. After a dispute arose over attorney fees, defendant initiated arbitration proceedings in accordance with the terms of the parties' fee agreements. Plaintiffs subsequently filed this action in circuit court, seeking a declaratory judgment that the provisions of the fee agreements requiring arbitration were void as a matter of law. After learning that defendant had initiated a prior action to compel arbitration, which was dismissed after plaintiffs agreed to proceed to arbitration, the trial court ordered the parties to arbitrate their underlying fee dispute. The court also determined that defendant was entitled to sanctions under MCR 2.114, but ruled that it would reserve its decision on the amount of sanctions until after the arbitration proceeding.

Defendant thereafter sought recovery of its costs and expenses associated with defending this action at the arbitration proceeding. Defendant argued that it was entitled to these expenses pursuant to paragraph 2 of its fee agreements with plaintiffs, which provided:

Client shall pay Attorney interest at the rate of 7% on any unpaid, past due indebtedness for said amounts and Attorney's expenses and stated hourly rates from time to time existing for all time expended by Attorney to enforce Attorney's rights under this Agreement.

At the arbitration hearing, defendant submitted a statement of its fees and costs incurred in this matter through June 1, 2005. Defendant's amended arbitration claim also included the following requested relief:

Consequently, Claimant requests that the Arbitrator enter an award in Claimant's favor as follows:

A. against Respondents Sheldon and Gale Korn and Cranbrook Park, LLC, jointly and severally, for \$4,408.85;

B. against Respondents Korn Family Limited Partnership and Sheldon, Gale, Shauna and Ashley Korn, jointly and severally, for \$119,341.30;

C. against all Respondents, jointly and severally, for whatever amount to which Claimant is entitled pursuant to Paragraph 2 of the attorney-client agreements; and

D. against all other Respondents for whatever other relief to which Claimant is found entitled.

The arbitrator subsequently issued a decision awarding defendant \$109,132.12. The award provided, in pertinent part:

2. Respondents [plaintiffs] shall pay to Claimant [defendant] the sum of One Hundred Nine Thousand One Hundred Thirty Two Dollars and Twelve Cents (\$109,132.12), for all claims asserted by Claimant in Paragraphs A, B and C of

Claimant's Amended Claims filed herein and dated April 25, 2005, plus interest at the statutory rate from the date of this award until paid in full. All other claims and counterclaims are denied.

* * *

This award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

After the arbitrator issued his award, defendant renewed its request for sanctions in the instant matter. Following an evidentiary hearing, the trial court awarded defendant its requested attorney fees and costs of \$35,380.67 for having to defend this action, pursuant to MCL 600.2591.

Appellant Richard now argues that because defendant elected to pursue its fees and costs associated with this action at the arbitration proceeding, and because the arbitration award encompassed all expenses associated with defendant having to defend this matter, defendant could not subsequently pursue recovery of those same expenses in this action. We agree.

In *Rafferty v Markovitz*, 461 Mich 265, 269-272; 602 NW2d 367 (1999), and *McAuley v General Motors Corp*, 457 Mich 513, 519-523; 578 NW2d 282 (1998), disapproved in part in *Rafferty*, *supra* at 273 n 6, the Supreme Court held that awards of reasonable attorney fees, permitted under different statutes or court rules, may not be duplicative. Thus, if a party recovers its litigation expenses, whether by statute, court rule, or contract, it may not receive a duplicative recovery under some other applicable authority if the intent is to only compensate the party for its litigation costs and not to impose a penalty in excess of the party's reasonable attorney fees. Although *Rafferty* and *McAuley* involved the recovery of attorney fees under the former Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*, the Civil Rights Act, MCL 37.2101 *et seq.*, and MCR 2.403(O), the reasoning applies equally to this case. Defendant submitted a claim for its costs and attorney fees associated with its defense of this action to arbitration and the arbitration award encompassed that claim.

In *Rafferty*, *supra* at 273 n 6, the Court repudiated dicta in *McAuley* "that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose." Accordingly, it does not matter whether sanctions under MCR 2.114 or MCL 600.2591 serve a different purpose than the recovery of attorney fees under the parties' fee agreement. What is significant is that neither the fee agreements, the court rule, nor the statute permitted defendant to recover more than its reasonable attorney fees and costs incurred. None of these sources permitted recovery of any sort of punitive damages.

Accordingly, as in both *McAuley* and *Rafferty*, defendant could not recover the reasonable cost of defending this action pursuant to both its agreements with plaintiffs and either by court rule or statute. We agree with Richard that this type of double-dipping is prohibited by *McAuley* and *Rafferty*.

By including a request for attorney fees and costs associated with this action in the arbitration proceeding, defendant agreed to forego its right to recover those same expenses in this action before the trial court. See *St George Greek Orthodox Church of Southgate, Michigan v*

Laupmanis Associates, PC, 204 Mich App 278, 283; 514 NW2d 516 (1994). Although defendant asserts that it did not recover all of its requested fees in arbitration, it is undisputed that defendant submitted a claim for its expenses in this action to the arbitrator, and it is clear from the face of the arbitrator's award that the award encompasses "all claims asserted." Thus, the amount of defendant's expenses associated with this action was decided by the arbitrator and defendant was not entitled to seek further recovery in this action.

The trial court reasoned that the arbitration award did not preclude it from awarding sanctions because only it, and not the arbitrator, had jurisdiction to award sanctions associated with this action. We agree that an award of sanctions in this action was an exclusive matter for the trial court. But regardless of the trial court's exclusive jurisdiction over this question, the arbitrator had jurisdiction to determine the amount of defendant's costs and attorney fees incurred in this action pursuant to the parties' fee agreements, and defendant was only entitled to a single recovery of those costs and attorneys fees. Whether labeled as sanctions or otherwise, those costs and attorney fees were undisputedly encompassed within the arbitration award and, therefore, could not be separately pursued or awarded in this action.

We disagree with defendant's argument that the two awards are not duplicative because the arbitrator's award is enforceable only against plaintiffs, whereas the trial court's award applies to both plaintiffs and their attorney, appellant Richard. This distinction is immaterial considering that the purpose of both awards is to compensate defendant for the cost of having to defend this action. Again, defendant is only entitled to recover its costs and attorney fees once, and allowing both awards to stand would amount to punitive damages.

For these reasons, the trial court erred in awarding defendant attorney fees and costs under MCR 2.114 and MCL 600.2591. The trial court's order is therefore reversed and vacated. In light of our decision, it is unnecessary to address appellant Richard's remaining issues.

Reversed and vacated.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis